

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION )	
FOR TRANSFER NO. 5676 IN THE )	<b>PRELIMINARY ORDER</b>
NAME OF NEIBAUR FARM )	(Note: This order has now become
ENTERPRISES )	final because exceptions were not filed)
_____ )	
_____ )	

This matter having come before the Idaho Department of Water Resources (the "Department") in the form of a protested application for transfer and the Department having held a conference and a hearing in the matter, the hearing officer enters the following Findings of Fact, Conclusions of Law and Preliminary Order:

**FINDINGS OF FACT**

1. On July 28, 1992, the Sixth Judicial Court of the State of Idaho decreed water right no. **13-02203** to Gem Valley Farms as follows:

Source:	Groundwater
Priority:	September 9, 1959
Rate of diversion:	3.1 cubic feet per second ("cfs")
Volume:	465 Acre Feet per Annum ("AFA")
Point of diversion:	NE1/4NW1/4 Section 19, T9S, R40E, B.M.
Use:	Irrigation
Season of use:	April 15 to October 15
Place of use:	155 acres within parts of Sections 18 and 19, T9S, R40E, B.M.

*(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).*

2. On July 28, 1992, the Sixth Judicial Court of the State of Idaho decreed water right no. **29-02352** to Gem Valley Farms as follows:

Source:	Groundwater
Priority:	July 31, 1954
Rate of diversion:	2.5 cfs
Volume:	687 AFA
Point of diversion:	SWSE Section 18, T9S, R40E, B.M.
Use:	Irrigation

Season of use: April 15 to October 15  
Place of use: 229 acres within parts of Section 18, T9S, R40E, B.M.

3. On March 1, 2000, Gem Valley Farms c/o Chad Neibaur filed Application for Transfer No. **5676** ("application") with the Department proposing to rearrange the irrigated acres in parts of Section 18, and 19, T9S, R40 E, B.M. and in part of Section 13, T9S, R39E, B.M. and to authorize the interconnection of two wells under water right nos. 13-02203 and 29-02352 for the irrigation of 373 acres as follows:

T9S, R39E, B.M.

Section 13 - Lot 2 - 35 acres, Lot 3 - 35 acres

T9S, R40E, B.M.

Section 18 - SW1/4 - 120 acres, SE1/4 - 120 acres

Section 19 - NENW - 26 acres, NWNW - 37 acres

The applicant subsequently changed the name on the application to Neibaur Farm Enterprises ("applicant").

4. A portion of water right no. 13-02203 identified as part 13-02203A has been retained by Paul Christensen, a previous owner of the land for the irrigation of 11 acres in NENW Section 19, T9S, R40E, B.M.

5. The Department published notice of the application which was subsequently protested by Warren Lloyd and Carl Jorgensen who withdrew his protest before the hearing.

6. On April 12, 2000, the Department conducted a hearing in the matter. The applicant was present and was represented by William Forberg. The protestant was present and was represented by Randall C. Budge.

7. Issues identified by the protestant are as follows:

- a) The proposed changes will constitute an enlargement in use of the water rights.
- b) The proposed changes will injure the water rights of the protestant.
- c) A portion of the waters sought for transfer has been forfeited through non-use for a period of five (5) or more years.

8. Exhibits premarked, offered or accepted as a part of the record are as follows:

- a. Applicant's Exhibit 1 - Schematic of Section 18 - Year 1959
- b. Applicant's Exhibit 2 - Schematic of Section 18 - Year 1969
- c. Applicant's Exhibit 3 - Schematic showing the location of pivots in the vicinity of the place of use
- d. Protestant's Exhibit A - Tabulation of well data in the Bancroft-Lund Water District dated January 1, 2000

9. The applicant acquired the land and water rights involved in the application in 1986. The wells associated with the two water rights had already been connected together by a successor-in-interest of the applicant which interconnection has existed since about 1979.

10. Prior to conversion to pivot irrigation, the land under the decreed rights sought for transfer were irrigated with wheel lines and solid sets. In the late 1980's the applicant changed the water system which diverts water from the well in section 18 to a center pivot. In about 1990, the applicant also changed the water system which diverts water from the well in section 19 to a pivot and wheel lines.

11. The applicant proposes to cease irrigating portions of corners which can not be irrigated well with the pivots and to move the water right associated with those corners to a new place of use. More specifically the land from which the applicant seeks to transfer water includes about 83 acres identified in green on Applicant's Exhibit 3 and is located as follows:

Section 18, T9S, R40E, B.M.

NESE - 10 acres  
 NWSE - 10  
 SWSE - 10  
 SESE - 10  
 NESW (lot 3) - 10  
 NWSW - 10  
 SWSW - 10  
 SESW (lot 4) - 10

Section 19, T9S, R40E, B.M.

NWNW (lot 1) - 3

12. The protestant lives close to the applicant's land and has observed the irrigation practice on the applicant's land. The protestant is concerned with enlargement in use and believes that some of the land from which the applicant proposes to transfer water has not been irrigated for a period of five or more years.

13. The protestant diverts irrigation water from wells which are located approximately 3/4 of a mile and 1 mile westerly of the applicant's wells.

14. The protestant testified that certain parts of the land from which the applicant proposes to transfer water have not been irrigated for 5 or more years. The land is described as follows:

Section 18, T9S, R40E, B.M.	
SWSE - 10	7 ac.
SESE - 10	7 ac
NWSW - 10	7 ac
SESW (lot 4) - 10	7 ac
Section 19, T9S, R40E, B.M.	
NWNW (lot 1) - 3	3 ac
Total	24 acres not irrigated

15. The applicant testified, however, that the following portion of the decreed place of use from which the applicant intends to transfer water has not been irrigated for 5 or more years. He identified the tracts as follows:

Section 18, T9S, R40E, B.M.	
SESE -	5.0 acres (southeast corner)
SWSW (lot 4) -	5.0 acres (southwest corner)
Section 19, T9S, R40E, B.M.	
NWNW (lot 1) -	1.0 acre total (northwest and southwest corners)
NWSW -	1.5 acres of rockpiles
Total	12.5 acres

The applicant also stated that there are rockpiles and improvements within some of the corners from which the applicant has applied to transfer the water. The improvements include a home, sheds, granaries, scale and potato cellars. The applicant estimated the area of the rockpiles to total 1 to 1.5 acres. The applicant has not measured the land which he presently irrigates or the land from which he intends to transfer the water rights.

16. Neither the applicant nor the protestant has actually measured the land irrigated or not irrigated as described in their testimony.

## CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, provides in pertinent part as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code ; ....

2. "[t]he director of the department of Water Resources has jurisdiction to determine the question of abandonment and forfeiture and such is required as a preliminary step to performance of his statutory duty in determining whether or not the proposed transfer would injure other water rights". Jenkins v. State, Dept. of Water Resources, 103 Idaho 384, 389, 647 P.2d 1256 (1982).

3. The applicant carries the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use and will be consistent with principles of conservation of the water of the state of Idaho.

4. Both the applicant and the protestant have the responsibility of coming forward with evidence regarding matters of public interest of which they are each most cognizant.

5. The applicant has the ultimate burden of persuasion for all of the criteria of Section 42-222, Idaho Code.

6. The applicant stated that 12 acres of the land from which the applicant proposes to transfer water have not been irrigated for a period of five or more years. The protestant estimates this amount of land to be about 24 acres.

7. The proposed changes will not constitute an enlargement in use of the original rights if the approval of the application includes a reduction in the irrigated land by 12 acres and by the amount of water associated with those acres.

8. The proposed changes will not injure other water rights if the approval of the application includes a reduction in the irrigated land by 12 acres and by the amount of water associated with those acres.

9. The proposed changes are in the local public interest.

10. The proposed changes are consistent with the conservation of water resources within the state of Idaho.

11. The Department should approve the application with certain conditions to prevent injury and enlargement.

## **ORDER**

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. 5676 in the name of Neibaur Farm Enterprises is **APPROVED** subject to the following conditions:

1. This approval authorizes a transfer of water to not more than 360.5 acres.

2. Use of water under this approval is not authorized until the right holder identifies for the Department and the watermaster the specific 12.5 acres which is not authorized for irrigation under this transfer. Upon written approval of the Department, the right holder can proceed with the changes authorized by this transfer.

3. The total instantaneous diversion of water from all points of diversion under Transfer 5676 shall not exceed 5.23 cfs nor a total combined annual volume of 1081.5 AF.

4. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.0 AFA at the field headgate for irrigation of the lands above.

5. The period of use for the irrigation described in this approval may be extended to a beginning date of April 1 and an ending date of October 31 provided that beneficial use of the water can be shown and other elements of the right are not exceeded. The use of water before April 15 and after October 15 is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than July 8, 1992.

6. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.

7. Prior to diversion and use of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion and annual volume diverted.

8. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.

9. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

Signed this 24th day of May, 2000.

/signed/  
L. GLEN SAXTON  
Hearing Officer